IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-542

Parcel I.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,

against

WILLIAM T. MORRIS, JR., MARY BERENICE McCALL, THOMAS Q. MORRIS, M. D., FINECAP REALTY COMPANY, a partnership, LINCOLN SAVINGS BANK OF BROOKLYN,
Defendants,

Relative to acquiring certain real property situate in the City of Yonkers, County of Westchester, State of New York.

Parcel II.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,

against

DAB-O-MATIC CORP. and GAZETTE PRESS, INC.,
Defendants-Appellants,

and

WILLIAM T. MORRIS, JR., MARY BERENICE McCALL, THOMAS Q. MORRIS, M. D., FINECAP REALTY COMPANY, a partnership, LINCOLN SAVINGS BANK OF BROOKLYN, CLOVER WIRE FORMING CO., INC., WOODHAVEN DRESS CO., INC.,
Defendants,

Relative to acquiring certain real property situate in the City of Yonkers, County of Westchester, State of New York.

Index No. 7296/73.

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Relative to acquiring certain real property situate in the City of Yonkers, County of Westchester, State of New York.

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YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,

against

LESTER WEINBERG, individually and doing business as GREAT EASTERN METAL PRODUCTS CO.,
Defendant-Appellant,

Relative to acquiring certain real property situate in the City of Yonkers, County of Westchester, State of New York.

Index No. 7357/73.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,

against

MARY BARCA as executrix of the Last Will and Testament of THOMAS BARCA, NANCY BARCA and ANGELO BARCA, JR., all doing business as BARCA BROS.,
Defendants-Appellants,

and

THE COUNTY TRUST COMPANY as Executor under the Last Will and Testament of MAITLAND BRENHOUSE, deceased,
Defendant,

Relative to acquiring certain real property situate in the City of Yonkers, County of Westchester, State of New York.

Index No. 7326/73.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS THE APPEAL AND/OR TO AFFIRM THE DECISION OF THE NEW YORK COURT OF APPEALS

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Statement

This brief is filed in support of respondent's motion to dismiss the appeal from the New York State Court of Appeals and/or to affirm that decision.

Appellants and other defendants were personally served with the pleadings herein. Immediately after the commencement of the proceedings a Declaration of Taking

was filed by respondent with the Westchester County Clerk, together with a sum of money equal to respondent's opinion of the value of the land sought to be taken, all pursuant to Section 555(2) of the General Municipal Law of the State. Appellants served and filed their answer. Additional supporting affidavits were submitted. No trial or hearing was had. The Court dismissed the affirmative defenses of appellants and granted the relief requested in the petition. Appellants filed a notice of appeal and requested a stay of the enforcement of the judgments of condemnation. The request was denied. The Appellate Division of the New York Supreme Court affirmed the judgments of condemnation. The Court of Appeals of New York, by a unanimous court, also affirmed.

In the meantime, the taking of the land and demolition have occurred and the land has been turned over to a private developer, the Otis Elevator Company, for renewal and development.

Two of these appellants were tenants in a building taken. They have received from respondent money for fixtures and moving as follows: Gazette Press, Inc., $10,000 for moving, $250,213 for fixtures; Dab-O-Matic Corp., $20,079 for moving, $106,010, for fixtures. The Declarations of Taking were filed on July 12, 1973 for Barca and June 15, 1973 for the other appellants. The judgments of condemnation are dated October 23 and 24, 1973. The properties were given up, pursuant to the judgments, in June of 1974. The written lease term of Dab-O-Matic Corp. would have expired October 31, 1978. The written lease term of the Gazette Press, Inc. would have expired June 30, 1980.

Neither of the tenants disputed the money awarded for fixtures and moving expenses.

The fee-owner appellants withdrew from the Court on written stipulation, the money deposited by respondent as follows, Barca $87,000, Weinberg $57,000. In addition,

Barca received $73,174 for fixtures and $12,500 for moving. Weinberg received $31,329 for fixtures and $16,339 for moving. None of the awards for fixtures or moving were contested. The judgments of condemnation appointed commissioners of appraisal to determine the value of the property taken and the just compensation to be paid. The hearings in the *Barca* case have actually been completed. The appellants moved at Special Term in Westchester Supreme Court to confirm the decision of the commissioners. That Court confirmed the award by its written decision dated October 21, 1975. An appeal of that decision is presently being considered by this respondent. No determination of value has yet been made by the commissioners with respect to the other fee owner, *Weinberg*.

Questions Presented

Whether the within appeal has a requisite finality to be reviewable by this Court.

Whether the within appeal presents a substantial federal question.

POINT I

The judgment of the New York Court of Appeals is not so final so as to permit the appellants to invoke the jurisdiction of the United States Supreme Court.

The statute invoked by the appellants, 28 U.S.C. Section 1257(2), to sustain the jurisdiction of this Court provides that only *final* judgments or decrees of a state's highest Court may be reviewed by the Supreme Court.

In this case New York's highest Court has decided that there are no issues of fact which require a trial and that on the record before it the taking was for a sufficiently public purpose. This decision does not possess the requisite appealable finality.

It has been repeatedly held by this Court that a petition for review will not lie until there is a final judgment, disposing of the whole case. All rights in the litigation must have been adjudicated, whether of title or damages. A case will not be permitted to be sent up in fragments of successive appeals. *United States* v. *Young*, 94 U.S. 254; *Luxton* v. *North River Bridge Co.*, 147 U.S. 337; *McGourkey* v. *Toledo & Ohio Railway*, 146 W.U. 537.

A judgment will be considered final where a Court has made a decree fixing the rights and liabilities of the parties and refers the case to a master for a ministerial purpose only, and no further proceedings are contemplated. But if the Court making the judgment, refers the case to a lower Court or to the master as a subordinate Court, for a judicial purpose, upon which a further decree is to be entered, then the judgment is not final. *Forgay* v. *Conrad*, 6 How 201; *Lodge* v. *Tuell*, 135 U.S. 232.

A clear and distinct rule of finality has been established by this Court in cases involving the sovereign's exercise of the power of eminent domain. The rule is best stated in *Catlin* v. *United States*, 324 U.S. 229, where at page 233 the Court said:

> "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. *St. Louis, I.M. & S.R. Co.* v. *Southern Express Co.*, 108 U.S. 24, 28. Hence, ordinarily in condemnation proceedings appellate review may be had only upon an order or judgment disposing of the whole case, and adjudicating all rights, including ownership and just compensation, as well as the right to take the property. This has been the repeated holding of decisions here. The rule applies to review by this Court of judgments of state courts, in advance of determination of just compensation, although by local statute 'judgments of condemnation,' i.e., of the right to condemn particular

property, are reviewable before compensation is found and awarded. *Wick* v. *Superior Court,* 278 U.S. 574, 575; *Public Service Co.* v. *Lebanon,* 305 U.S. 558, 671; cf. *Dieckmann* v. *United States,* 88 F.2d 902. The foundation of this policy is not in merely technical conceptions of 'finality'. It is one against piece-meal litigation. 'The case is not to be sent up in fragments . . .' *Luxton* v. *North River Bridge Co.,* 147 U.S. 337, 341. Reasons other than conservation of judicial energy sustain the limitation. One is elimination of delays caused by interlocutory appeals."

In this case there has been no adjudication of all of the rights of the parties. Just compensation has not been finally determined. That issue has been referred to commissioners for a trial after which a further judgment will be entered in the State courts. The matters to be tried by the commissioners are not ministerial. Mere execution of the judgment is not what is left to be done. The commissioners are charged with a judicial purpose involving the merits of the litigation and the constitutional rights of just compensation. *New York State Constitution, Article 1, Section 7.*

Appeals from a judgment entered on a decision of the commissioners is appealable and may involve constitutional issues reviewable by this Court. This is unlike the cases where after judgment, only a ministerial duty, such as an accounting, remains to be fulfilled. In those ministerial type cases, review is allowed of the adjudication that is completed because those ministerial type duties remaining to be completed could not remotely give rise to a federal question. However, in condemnation cases, what remains to be done after the entry of a judgment of condemnation is not ministerial and could give rise to federal questions reviewable by this Court.

See:

Radio Station WOW, Inc. v. *Johnson,* 326 U.S. 120;

Grays Harbor Logging Company, et al. v. *Coats-Fordney Logging Company,* 243 U.S. 251;
Caroudelet Canal & Nav. Co. v. *Louisiana,* 233 U.S. 362.

In the *Grays Harbor* case, op. cit., the appellants there argued as do the appellants here, that the judgment made by the state Court should be regarded as finally disposing of a distinct and definite branch of the case and leaving the issue of just compensation as a separate branch of the case. This appears to be the obvious thrust of appellants' jurisdictional statement notwithstanding the attempt therein to distinguish *Catlin, supra.* That argument was rejected there and should be rejected here. This is so even though the state Courts are bound by the decision of the state's highest Court as the law of the case. *Grays Harbor Logging Company, e al.* v. *Coats-Fordney Logging Company, supra; United States* v. *Denver & Rio Grande R.R.Co.,* 191 U.S. 84.

Like the judgment appealed from in the *Grays Harbor* case, this judgment, adjudicating that plaintiff-respondent had the right to acquire the land, is an interlocutory judgment under New York law. *Manhattan Ry.Co.* v. *Stroub,* 70 Hun. 363 (N.Y.). The appeal in the case at bar made to the Appellate Division of the Supreme Court in New York and to the Court of Appeals of New York are expressly denominated intermediate appeals by the Courts.

See:

Central Hudson Gas & Electric Corporation v. *Newman,* 35 A.D.2d 989, 317 N.Y.S.2d 887;
Great Neck Water Authority v. *Citizens Water Supply Co. of Newtown,* 12 N.Y.2d 167.

As such it is contemplated and expected that further appeals from judgments or orders on the merits may reach the Appellate Courts. It is precisely for this reason that the rule of finality in condemnation cases has been pre-

scribed. Otherwise there will be successive and fragmentary appeals to this Court.

It is a simple proposition that in condemnation cases there are federal questions that may arise through the trial on just compensation, which questions may be reviewable by this Court. This Court has said that we must wait until the litigation ends in the state courts before seeking review in the Supreme Court. Speaking for the Court in the *Radio Station WOW, Inc.* case, *supra,* Mr. Justice Frankfurter, at page 124, said:

> "This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our Federal System."

In the case at Bar, appellants are not precluded from seeking review of any federal question that may now be presented. It is simply that they are here too early. They may return again upon the federal questions now raised, as well as any other federal questions that may be raised in the proceedings to come in the state Courts.

The fact that New York procedure permits review in the Appellate Courts of the State is not determinative of the appealability of the judgment in the Supreme Court. This Supreme Court is not bound by such rules in the state Courts. The right to appeal to this Court will not depend upon and vary with the fifty state procedures, *Catlin* v. *United States, supra.*

There is no possibility in this case that review now by this Court can prevent irreparable injury to these appellants. As the New York Court of Appeals has noted, the takings have occurred without hindrance and the buildings have been demolished. In addition, the appellants have received an amount of money equal to the respondent's opinion of the fair market value of the property taken. That opinion of value is disputed and the trials before the

commissioners have begun. The New York Appellate Courts have refused appellants' applications to stay the takings and demolition pending the appeal. Accordingly, those cases which permit review of judgments that appear interloctory, because the losing party would suffer irreparable injury if review were unavailing, are not applicable. *Republic Natural Gas Co.* v. *Oklahoma,* 334 U.S. 61, 92 L.Ed. 1212.

The *Republic* case, *supra,* involved a judgment of the Oklahoma Supreme Court which upheld a determination of a state agency concerning the correlative rights of owners of Natural Gas drawn from a common source. The Oklahoma decision left open for future determination, the terms upon which gas may be taken and the rates that must be paid.

In considering the question of jurisdiction in the *Republic* case, the Supreme Court likened the case to the precedents set by this Court on the questions of jurisdiction in condemnation cases (p. 71).

The closing paragraphs of the Supreme Court's decision in *Republic* are determinative of the issue of jurisdiction in this case.

> "The condemnation precedents attract this case more persuasively than do the accounting cases. Where it is claimed that a decree transferring property overrides an asserted federal right, as in *Forgay* v. *Conrad,* 6 How (US)201, 12 L ed 404, and *Radio Station WOW* v. *Johnson,* 326 US 120, 89 L ed 2092, 65 S. Ct. 1475, both supra, no disposition of the subsequent accounting proceeding can possibly make up for the defeated party's loss, since the party who has lost the property must also pay to his opponent what the accounting decrees. Hence his desire to appeal the issue of the right to the property will almost certaintly persist. On the other hand, in an eminent domain case, as in a case

like this, the fate of the whole litigation may well be affected by the fate of the unresolved contingencies of the litigation. An adequate award in an eminent domain case or a profitable rate in the case before us might well satisfy the losing party to acquiesce in the disposition of the earlier issue. It is of course not our province to discourage appeals. But for the soundest of reasons we ought not to pass on constitutional issues before they have reached a definitive stop. Another similarity between this case and the condemnation cases calls for abstention until what is organically one litigation has been concluded in the State. It is that the matters left open may generate additional federal questions. This brings into vivid relevance the policy against fragmentary review. In accounting cases, that which still remains to be litigated can scarcely give rise to new federal questions.

The policy against fragmentary review has therefore little bearing. But contests over valuation in eminent domain cases, as price-fixing in this type of case, are inherently provocative of constitutional claims. This potentiality of additional federal questions arising out of the same controversy has led this Court to find want of the necessary finality of adjudicated constitutional issues in condemnation decrees before valuation has been made. Like considerations are relevant here.

In short, the guiding considerations for determining whether the decree of the Court below possesses requisite finality lead to the conclusion that this case must await its culmination in the judicial process of the State before we can assume jurisdiction. 'Only one branch of the case has been finally disposed of below, therefore none of it is ripe for review by this court.' *Collins* v. *Miller*, 252 US 364, 371, 64 L ed 616, 619, 40 S. Ct. 37. This makes it unnecessary to consider whether the mere fact that the decree gave alternative

commands precluded it from being final. Ct. *Paducah* v. *East Tennessee Teleph. Co.*, 229 US 476, 57 L ed 1286, 33 S. Ct. 816; *Jones* v. *Craig* (*Barker* v. *Craig*), 127 US 213, 32 L ed 147, 8 S. Ct. 1175; Note, *48 Harv L Rev 302, 306*. Since the judgment now appealed from lacks the necessary finality, we cannot consider the merits. All of Republic's constitutional objections are of course saved."

The prior decision of this Court, being clear and unequivocal and reaffirmed time and again holding that appeals in condemnation cases, even from the highest state courts, but before compensation has been awarded do not have the requisite finality to invoke the jurisdiction of this Court, are determinative of that issue now presented and utterly foreclose any consideration of the merits at this time.

POINT II

The entry of a judgment of condemnation without a trial or evidentiary hearing is not a violation of the Fourteenth Amendment to the United States Constitution.

Sections 4, 5 and 6 of the Condemnation Law of New York outline the procedure for the commencement of condemnation proceedings. Section 4 sets forth with specificity what the petition must contain. The defendant in a condemnation proceeding will thus know, have notice of, the full identity of the condemnor, a detailed description of the real property sought to be taken, the public use for which the property is required, that the plaintiff has been unable to agree with defendant to purchase the property, the plaintiff's opinion of the value of the property, that all preliminary steps required by law have been taken, that plaintiff intends in good faith to complete the work and the relief requested. Section 5 provides that all the owners of the property be served

with the petition and a notice telling them where and when the petition will be presented. Section 6 provides that the petition and notice must be served as a summons would be served.

There is no dispute that these appellants have received the petition and notice in accordance with these Sections of the Condemnation Law.

Section 11 of the Condemnation Law provides that there shall be a trial of any factual issue that may be raised by the petition and answer.

Under New York law, condemnation proceedings are special proceedings and are thus governed by Article Four of the Civil Practice Law and Rules. *Iroquios Gas Corp.* v. *Gernatt,* 50 Misc.2d 1028, 272 N.Y.S.2d 291, aff'd. 28 A.D. 2d 811, aff'd. 22 N.Y.2d 694. Section 409(b) of the Civil Practice Law and Rules states:

> "The Court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised."

Furthermore, in a condemnation case, the New York Court of Appeals held:

> ". . . the standards of summary judgment applied to actions should be applied by the court to proceedings governed by CPLR 409 [b]."

See:

Port of New York Authority v. *62 Cortlandt St. Realty Co.,* 18 N.Y.2d 250 (p. 255); certiorari denied 385 U.S. 1006.

Thus it becomes clear that appellants' contention that the Courts of New York improperly treated the petition as an application for summary judgment is ill-founded. No new notice or new affidavit for the same relief is required under the New York procedure in condemnation

proceedings. The defendant-owner knew that when they are served with the original notice and petition that there could be a summary disposition of the proceeding without a trial.

The principle that summary disposition may be made by a Court in a condemnation case after service of the pleadings is so well settled that the New York Court of Appeals, in this case, did not see need to address itself to the issue.

The reason that appellants did not get a trial is because they failed to raise any triable issue of fact. They have clung to and have thrust upon the Court only "an untenable contention", see p. 9 Court of Appeals decision.

Coupled with appellant's attack upon the summary procedure authorized by New York law in these cases, is an attack upon Section 555 subd. (2) of the General Municipal Law of New York. That Section is an early-taking authorization granted to governments at the start of legal actions and universally providing for a deposit of money and opportunity for prompt judicial review.

The validity of such provisions has already been passed upon by this Court.

See:

United States v. *Miller,* 317 U.S. 369;
Catlin v. *United States,* 324 U.S. 229;
Great Falls Mfg. Co. v. *Attorney General,* 124 U.S. 581;
Backus v. *Fort Street Union Depot Co.,* 169 U.S. 557;
Williams v. *Parker,* 188 U. 491;
Moody v. *Jacksonville,* 20 Fla. 597;
Palisade v. *Orchard Mesa Irr. Dist.,* 85 Colo. 57;
City of Glen Cove v. *Utilities and Industries Corporation,* 17 N.Y.2d 205;
Schrader v. *Third Judicial District,* 58 Nev. 188.

The concept of early takings is recognized in other statutes in New York, Public Housing Law Section 125(2), Highway Law Section 30(3). See also District of Columbia Code Ann. Section 16-1353 (1971), 40 U.S.C. 403 (c) (National Recovery Act), 50 U.S.C. 171 (War Purposes Act), 48 U.S.C. 850 (Reindeer Industry Act).

All of these provisions, though swift and effective their application may be, are tempered with the inescapable safeguards of due process.

The New York statutory framework provides that a declaration of taking may be filed after the commencement of the proceeding, but before judgment; money equal to the taker's opinion of value must be deposited, no commission or poundage is to be charged against said deposit, the deposit earns interest, it may be withdrawn by the property owner. Section 555(2) Gen. Mun. Law. That Section also provides that the taker must file a sworn declaration containing detailed statements and that the Court shall have the power to fix the time within which and the terms upon which the owner shall be required to surrender possession. Furthermore, the amount of money deposited by the taker is not conclusive as to value. Value and just compensation may be disputed and litigated by the owner. Section 26 of the Condemnation Law empowers the Court before whom the proceeding may be pending,

> ". . . to make all necessary orders and give necessary directions to carry into effect the object and intent of this chapter, and of the several acts conferring authority to condemn lands for public use, and the practice in such cases shall conform, as near as may be, to the ordinary practice in such court."

As a result of the various procedural safeguards which may result in the delay or prevention of acquisition of actual possession of the property by the taker notwithstanding the filing of a declaration of taking, this Court

has expressed the view that under such circumstances, the date of "taking" is the date on which the taker actually entered and appropriated the property to public use.

See:

United States v. *Miller,* 317 U.S. 369, p. 380-1;
United States v. *551.03 Acres of Land,* 249 F. Supp. 253;
Covered Wagon Inc. v. *C.I.R.,* 369 F.2d 629;
West, Inc. v. *United States,* 374 F.2d 218.

In the case at bar, the respondent entered into possession more than one year after the commencement of the proceeding and the filing of the declaration. It took possession of the land pursuant to a judgment of condemnation made by the New York Supreme Court and after the appellants had notice and opportunity to be heard. Section 555(2) Gen. Mun. Law was thus not the source of the authority to possess. The lawful process of the Court was.

Appellants' contentions that their property cannot be taken without a "pre-termination" or "pre-appropriation" hearing as it has been taken in this case, does not find support in so-called consumer and creditor type cases cited by them.

Fuentes v. *Shevin,* 407 U.S. 67, 32 L. Ed. 2d 556, permitted a secured installment creditor to repossess goods sold, without notice, without hearing, and without judicial order or supervision. Because carried out without notice and opportunity to be heard and without judicial participation, that kind of seizure was held violative of the Due Process Clause. Firstly, the case at bar is not like the *Fuentes* case. The appellants had notice, opportunity to be heard, a court order granting possession, and judicial supervision and participation. Secondly, the taker here is a governmental unit where the prospect of violence and resort to self help schemes to the injury of the victims are lessened if not avoided.

See:

Mitchell v. *W. T. Grant Company,* 94 S.Ct. 1895, p. 1905;

Adams v. *Southern California First National Bank,* 492 F.2d 324.

Even the *Fuentes* case stated the well-settled principle that due process requires notice and opportunity to be heard (p. 82). It does not require a hearing. *Bell* v. *Burson,* 402 U.S. 535. Naturally a hearing will be had if the pleadings raise an issue of fact. In the case at bar there is no issue of fact, only "an untenable contention".

Sniadach v. *Family Assistance Corp.,* 395 U.S. 337, 23 L. Ed. 2d 349, involved pre-judgment garnishment of wages. That Court said that that situation presented "a specialized type of property presenting distinct problems in our economic system". 395 U.S. p. 340.

Goldberg v. *Kelly,* 397 U.S. 254, 25 L. Ed. 2d 287, involved summary termination of welfare benefits without opportunity to contest determination, also a specialized type of property.

In short, these cases are constitutionally distinguishable from the case at bar. This proposition is supported by the more recent decision of this Court in *Mitchell* v. *W. T. Grant Company,* 94 S. Ct. 1895 (1974). That case involved the validity of sequestration of property upon a creditor's *ex parte* application to a Court and the filing of a bond by the creditor. The Louisiana statute there in question authorized the *ex parte* sequestration order but directed the issuance of a citation and the writ of sequestration to the debtor citing him to file pleadings or make an appearance within 5 days. The citation recited the filing of the writ, the affidavit of the creditor, the order and the bond. This Court did not find that procedure violative of due process.

In the case at Bar, the condemnation action is begun first, a petition and notice are served, a copy of the declaration to be filed was attached to the petition and money is deposited. No possession is taken by the condemnor. The filing of the declaration does not self-effect possession. It transfers title only—and defeasable title at that. *United States* v. *44 Acres of Land,* 234 F. 2d 410, cert. denied 352 U.S. 916; *Travis* v. *United States,* 287 F. 2d 916, cert. denied 368 U.S. 824. The *United States* v. *Miller* opinion clearly states the purpose of the taking statute, at p. 381:

> "The purpose of the statute is two-fold. First, to give the Government immediate possession of the property and to relieve it of the burden of interest accruing on the sum deposited from the date of taking to the date of judgment in the eminent domain proceeding. Secondly, to give the former owner, if his title is clear, immediate cash compensation to the extent of the Government's estimate and appropriately provides that, if the judgment ultimately awarded shall be in excess of the amount deposited, the owner shall recover the excess with interest."

There was no self-help or unilateral seizure by respondent here that deprived the appellants of their property without due process. No such seizure could occur without prior notice and without Court participation and supervision. In fact, as noted above, the seizure of the property was done pursuant to a judgment of the Court after notice and opportunity to be heard and after the Appellate Court refused to stay execution of the judgment. Section 555(2) of the Gen. Mun. Law was not the pulsating source of the acquisition of possession. The Court judgment was. Further, the Court of Appeals found it unnecessary to address itself to the validity of that statute which issue was pressed upon it by the appellants. It simply was not a factor in this case.

Thus, the statutory framework in this case is more immune to succesful attack than was the valid Louisiana statute in *Mitchell* v. *W. T. Grant, supra.* That case distinguished the consumer-type cases because those cases lacked the due process safeguard present in *Mitchell.* Those safeguards are present here too.

POINT III

This appeal presents no substantial federal question, the question having been foreclosed by previous opinions and otherwise resting on adequate non-federal grounds.

The New York Court of Appeals decision at p. 2, enunciated the issue as being whether the appellants are entitled to a trial to determine whether the takings here serve a dominantly public purpose. That Court answered that question in the negative.

Impliedly and necessarily so, the Court in answering "no" to the question, said that the appellants raised no triable issue of fact and that respondent was entitled to summary judgment granting condemnation (CPLR Section 409(b)).

Thus the review of the merits must evolve around a demurrer to the petition and supporting papers, and whether that demurrer presents a substantial federal question reviewable by this Court.

The gravamen of appellants' contention appears to be that their constitutional right to due process has been violated because the property here was taken by respondent for a private purpose, that is, the expansion of the plant facilities of the Otis Elevator Company, a leading industrial employer in Yonkers, and further that this violation of their rights is not cured by receipt of adequate and just compensation.

The Court succinctly, but pointedly, disposed of appellants' argument (p. 3):

> "Where, then, land is found to be substandard, its taking for urban renewal is for a public purpose, just as it would be if it were taken for a public park, public school or public street. The fact that the vehicle for renewed use of the land, once it is taken, may be a private agency, does not in and of itself change the permissible nature of the taking of the substandard property. Of course, if property has not been determined to be substandard in an urban renewal context, it may not be taken in eminent domain unless it is proved that its taking was for another public purpose and, if there was also a private benefit involved, that the public purpose was dominant.
>
> Therefore, if we assume that the land here involved was substandard, as found by the Yonkers City Council and its Planning Board, it would be no defense to its condemnation that Otis openly expressed a desire to acquire it to assure its own continued economic viability in Yonkers. It would not then be necessary, as a precondition to the taking, to determine that the public benefit in assuring the retention of Otis as an increased source of employment opportunity in Yonkers was sufficient to outweigh the benefit that may be conferred on Otis.
>
> For the same reasons, the fact that the Council's public hearings were held after the selection of Otis as sponsor rather than beforehand, or that the City openly and admittedly signed an agreement with Otis before the condemnation of the land, under the circumstances here, and especially in the light of Otis' ongoing economic importance to the community, must, at most, be regarded as mere irregularities cured by the fact that the hearings were actually held. It is also worth noting that, though presented with the

opporunity for disapproval, the bi-partisan City Council was unanimous in its vote for approval.

For the same reasons and on the same assumption that the area involved was substandard, it would be no defense that Otis had indicated it would leave Yonkers if suitable land was not found for its needed modernization and expansion, or that the condemned land was adjacent to Otis' existing facilities, or that the two sites it had earlier rejected, as either uneconomical or unsuitable, were not substandard. There is nothing inherently wrong in serving both the City's need for renewal of its substandard land and its desire to keep Otis in Yonkers at one and the same time. Nor is it remarkable that Otis would get the condemned land for a price which is but a fraction of that paid to the defendants and the other owners in condemnation."

What is left of appellants' argument after disposition by the Court of Appeals is merely a difference of opinion and an attack upon motives, neither of which can be pressed successfully.

Further, the law of New York is that even if the affected property were not substandard, nevertheless, condemnation of economically undeveloped property which is suffering from stagnation is cognizable as a public purpose. *Cannata* v. *City of New York,* 11 N.Y.2d 210. *Kaskel* v. *Impelliteri,* 306 N.Y. 73; *Berman* v. *Parker,* 348 U.S. 26; and pg. 3 of Court of Appeals decision here.

The respondent does not dispute that the question of what is a public purpose is ultimately a judicial one, and never did. However, respondent has shown all deliberate and valid acts supportive of a public purpose condemnation. Appellants have not disputed the sub-standard nature of the area. Appellants' brief and moving affidavit below

contain a crushing admission where at page 19 of the brief, addressed to the Appellate Division of the New York Supreme Court, they said:

> "Defendants do not raise the question whether particular parcels are necessary to the plaintiff's purpose, or whether particular parcels are 'slum' or 'substandard' . . ."

At page 4 of appellants' affidavit in support of the order to show cause, addressed to the Court, dated October 30, 1973, it is stated:

> "The accomplishment of clearing the area of buildings denominated as substandard is ancillary to and subordinate to the principal purpose of granting this enormous benefit upon Otis. . . ."

They focus on the subsequent redevelopment by a private corporation, and thereby conclude it is not a public purpose. They agree with all the "physical facts" in the case, but they disagree with the motive of the respondent and City and wish to substitute their opinion on public purpose. This attack has been definitely rejected.

In the urban renewal statutes and under New York Law clearance of blighted areas is in itself a public purpose. See also 19 New York Juris, Section 13. More pointedly, the urban renewal statutes and cases specifically sanction, authorize and in fact encourage redevelopment by private persons. Section 501 of the Gen. Mun. Law, in defining the policy and purposes of the law, provides in part:

> ". . . the undertaking of public and private improvement programs related thereto and the encouragement of *participation in these programs by private enterprise.*" (Italics added)

See also: N.Y. Constitution, Sections 2, 9 & 10 of Article 18, and General Municipal Law, Section 507.

The language in Judge Van Voorhis' opinion in *Kaskel, supra,* which was concurred in by the entire court is relevant here. He said:

> "The slum area may be cleared, replanned, reconstructed and rehabited according to *any* design and for *any* purpose which renders the area no longer substandard or insanitary." (306 N.Y. p. 93) (Italics added)

The case of *Denihan Enterprises* v. *O'Dwyer,* 302 N.Y. 451, is the only case cited by appellants which procedurally called for a trial before the determination of public purpose. The case is clearly distinguishable from the instant case. The case involved a statute authorizing municipal construction of parking garages which would be strictly limited to *public* parking. Thus, the re-use of the condemned land was of central importance to the legality of the taking. If the garage was to be for private parking, then the taking is illegal. In *Denihan,* the statute required a focusing on the ultimate re-use mandating that it be public, to be legal. There is no such requirement in the statutes quoted above.

Thus, we are left with a reasoned and publicly announced and heard determination by a bi-partisan unanimous City Council, which is entitled to great weight.

See:

Amalgamated Housing Corp. v. *Kelly,* 193 Misc. 961 (N.Y.);
Matter of Murray v. *LaGuardia,* 291 N.Y. 320;
Matter of New York City Housing Authority v. *Muller,* 270 N.Y. 333.

The Courts will accept as fact that which is expressed in an act or ordinance to be the legislative purpose, unless from the face of the act or ordinance or from facts which

may be judicially noticed, it is made to appear that the taking is not for the expressed purpose.

See:

McCabe v. *City of New York,* 213 N.Y. 468;
City of Utica v. *Damiano,* 20 Misc. 2d 804 (N.Y.);
Culgar v. *Power Authority of State of New York,* 4 Misc. 2d 879 (N.Y.).

Secondly, we are given the gratuitous statement by appellants that they do not raise the question of whether the property is slum or substandard, *supra.*

Thirdly, we are pressed with the argument of after-use as being the "dominant" purpose of the taking. Under New York law such dichotomy of purpose when land is taken because it is substandard or economically stagnated is inappropriate and "untenable".

Thus the Court of Appeals did not make itself the "paper shield" or "rubber stamp" of anyone's improper conduct. In the closing paragraph of its opinion, it crystallized the defect in appellants' argument where it stated that they subordinated a valid issue, substandardness, i.e. acknowledging that that issue is not raised, under an untenable contention, to wit, the giving of the property to Otis after the slum clearance.

Thus, under New York Law, the within taking, even without a trial, was proper.

In light of the law of the State of New York as announced by the Court of Appeals, the final arbiter of New York Law (*Scripto Inc.* v. *Carson,* 362 U.S. 207, 4 L.Ed.2d 660), and the question or issue pressed here by appellants, it is clear that there is no substantial federal question of which this Court should take cognizance. It is acknowledged that whether there is such a question is for this Court to determine. (*Angel* v. *Bullington,* 330 U.S. 183, 91 L.Ed. 832). Even if a federal question is pre-

sented, it must (1) be substantial; (2) be not merely formal; (3) not be devoid of merit so as to be frivolous; (4) not be foreclosed by prior decisions of this Court so as not to present a real controversy; and (5) not be supportable on adequate non-federal grounds.

See:

Equitable Life Assurance Society v. *Brown,* 187 U.S. 308 47 L.Ed. 190;
McNulty v. *California,* 149 U.S. 645, 37 L.Ed. 882;
Wilson v. *No. Carolina,* 109 U.S. 586;
Heiter v. *United States,* 260 U.S. 438, 67 L.Ed. 338.

If the highest Court of the State has acted in accord with the laws and procedures of that State, then only in very exceptional circumstances will this Court justifiably find a denial of due process, i.e. a substantial federal question. The Court must find that these appellants have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of a citizen. It is not sufficient that this Supreme Court would have followed a different course than that followed by the New York Court of Appeals. That is not the test. That the Supreme Court may share appellants' complaint that condemned property should not be given to private enterprise, after slum clearance, because it leads to socialism or communism (p. 72, appellants' brief to the Court of Appeals), does not justify interference by this Court in the internal judicial and legislative workings of a sovereign state. (*Hovey* v. *Elliott,* 167 U.S. 409; *Wilson, supra.*) The Supreme Court corrects constitutionally wrong judgments, it does not revise decisions or give advisory opinions. (*Herb* v. *Pitcairn,* 324 U.S. 217, 89 L.Ed. 789.)

If the decision below rests on an adequate state, non-federal, grounds, there can be no review by this Court.

See:

Murdock v. *Memphis,* 20 Wall 590, 22 L.Ed. 429;
Johnson v. *New Jersey,* 384 U.S. 719, 16 L.Ed.2d 882.

Even if the state court decided the case on both federal and state questions, there will be no review if decision of the federal question was unnecessary because of the disposition of the state question. (*Jankovich* v. *Indiana Toll Road Commis.,* 379 U.S. 487, 13 L.Ed.2d 439.)

A review of the decision of the New York Court of Appeals reveals no determination by it of the constitutionality of Section 555(2) of the General Municipal Law. Such a determination was not necessary. The "taking" did not occur by virtue of that Section. It occurred as a result of a judgment of condemnation after notice and opportunity to be heard were afforded these appellants. Thus, whether that statute on its face or as applied violated constitutional due process is of no relevancy in deciding this case. Even if the constitutionality of that statute were necessary for a decision below, that issue has already been decided, definitively by prior decisions of this Court involving markedly similar statutes (*United States* v. *Miller, supra,* etc.). Appellants are asking this Court to decide again a federal question already decided and settled. Moreover, since there is no dispute that appellants were not otherwise deprived of procedural due process, the decision of the New York Court of Appeals can be clearly seen as resting on state grounds only, or if you will, on no substantial federal ground.

Aside from the validity of the attacked statute, the summary disposition of the case without a "pre-appropriation" hearing falls clearly within the constitutional boundaries of due process. The prior decisions of this Court have sanctioned less stringent summary procedures. (*Mitchell* v. *W.T. Grant Company, supra; Ownbay* v. *Morgan,* 256

U.S. 94.) The *Ownbay* decision survived the *Fuentes* decision and is reinvigorated by *Mitchell*. Thus, the constitutional validity of the summary procedure utilized here, or in every litigated case where no issue of fact is raised, is well established and its re-review by this Court is not justified. The prior decisions of this Court tell us that it cannot invalidate summary judgment proceedings, as appellants ask. Such a reversal would send us back to the dark ages of due process. The entire statutory framework of our State and Nation, and in fact the civilized world, is replete with summary disposition of property, under due process, without pre-appropriation hearings.

Further, the prior decisions of this Court on jurisdiction in eminent domain cases, discussed above, have so foreclosed the issue now presented as to make this appeal not only devoid of controversy, but frivolous. The Court of Appeals said as much at p. 9 of its decision:

> ". . . owner seek not, in effect, the retention of their properties, but the wreaking of some kind of vengeance on the city".

There is no substantial federal question presented, not already decided, the constitutional validity of slum clearance itself being a specie of public purpose. There is just no room for appellants' argument that the salvation of the Otis Elevator Co. was the dominant and motivating force behind this condemnation. There is no state or federal ground to support that argument, absent fraud, corruption or a false finding of slum and stagnating conditions. None of these issues were raised by appellants and they do not raise them here.

CONCLUSION

The appeal should be dismissed and/or the decision of the New York Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

Section 555, General Municipal Law.

§ 555. Acquisition of property.—1. (a) Real property or any interest therein, *including but not limited to air rights, and easements or other rights of user necessary for the use and development of such air rights, to be developed as air rights sites for the elimination of the blighting influences over an area or areas consisting principally of land in streets, alleys, highways, and other public rights of way, railway or subway tracks, bridge or tunnel approaches or entrances, or other similar facilities which have a blighting influence on the surrounding area* necessary for or incidental to any urban renewal program or part thereof in accordance with an urban renewal plan may be acquired by an agency by gift, devise, purchase, condemnation or otherwise and by a municipality for and on behalf of an agency by condemnation. Property may be acquired by condemnation by an agency or by a municipality for an agency pursuant to the condemnation law or pursuant to the laws relating to the condemnation of land by the municipality for which the agency is acting or the municipaliiy, as the case may be.

(b) Property so acquired by an agency, or by a municipality in behalf of an agency, shall be exempt from taxation until sold, leased for a term not exceeding ninety-nine years or otherwise disposed of in accordance with the provisions of this article or article fifteen of this chapter; provided, however, that any such agency shall have the power and authority, with respect to such property, to pay, out of funds available to it for the effectuating of such urban renewal program, annual sums in lieu of taxes to any taxing jurisdiction providing services to the urban renewal area, or to the part or portion thereof within such taxing jurisdiction, in order that no such taxing jurisdiction shall suffer an inequitable loss of revenue by virtue of such urban renewal program; provided, further, that the

amount so paid for any year with respect to any such property shall not exceed the lesser of (1) the sum last levied for the benefit of such taxing jurisdiction as an annual tax on such property prior to the time of its acquisition for urban renewal purposes or (2) such amount as shall be approved by the commissioner, pursuant to such rules, regulation, limitations and conditions as he may prescribe, as an eligible and proper charge against such urban renewal program. Upon the sale, lease or disposition of such property to any person, firm or corporation not entitled to an exemption from taxation or entitled to [2]*only* a partial tax exemption such property shall immediately become subject to taxation in whole or in part, as the case may be, and shall be taxed pro rata for the unexpired portion of the taxable year.

As used in this paragraph, the term "taxing jurisdiction" means any municipal corporation or district corporation including any school district or any special district, having the power to levy or collect taxes and benefit assessments upon real property, or in whose behalf such taxes or benefit assessments may be levied or collected.

(c) Notwithstanding any other provisions of this article, an agency may acquire by purchase, gift, devise, condemnation or otherwise, in accordance with the appropriate provisions of any general, special or local law or charter applicable to the acquisition of real property by such agency, such real property or any interest therein, within an area designated pursuant to[1] article *fifteen of this chapter* as appropriate for urban renewal, as it may deem ultimately necessary or proper to effectuate the purposes of this article although temporarily not required for such purposes provided that the early acquisition of such property is approved as follows:

(1) In a municipality where there is a planning commission, the agency shall submit the proposal for early acquisition to the commission for its approval. Such planning

commission shall, not later than ten weeks from the date of the referral of the proposal to it, after a public hearing held on due notice, submit its report to the [1]*governing body* certifying its unqualified consent, its disapproval, or its qualified consent with recommendations for modifications of the proposal.

After public hearing held on due notice after the report is received or due from the planning commission, the [2]*governing body* may:

(i) if the commission shall have certified its unqualified consent, *by majority vote authorize the agency to* proceed with the acquisition;

(ii) if the commission shall have certified its disapproval or shall have failed to make its report within ten weeks from the date such proposal was submitted to it[3], *nevertheless authorize the agency to* proceed with the acquisition[4], *but only by a three-fourths vote;*

(iii) if the commission shall have certified its qualified consent together with recommendations for modifications of the proposal, *authorize the agency to* proceed with the acquisition in accordance with the modifications recommended by the commission[5], *by majority vote, or authorize such acquisition without such modifications but only by a three-fourths vote.*

(2) In a municipality where there is no planning commission, the agency [1]*shall submit the proposal to the governing body which* after public hearing held on due notice[2], *may either approve or disapprove the proposal.*

2. Notwithstanding the provisions of any general, special of local[1] *law* or charter *provision* applicable to the acquisition of real property by condemnation, in any condemna*tion proceeding brought by an agency or a municipality for* and on behalf of an agency to acquire property in an urban renewal area[2] the agency or the municipality may file, at any time before judgment a declaration by the petitioner

that the property described in the petition is being taken in connection with the carrying out of an urban renewal program. Such declaration shall include or have annexed a statement of the authorization for the taking, a description of the property sufficient to identify same, and a statement of the sum of money estimated to be just compensation for the property being taken. Upon filing such declaration and the deposit, in the court in which the proceeding is pending, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in such declaration, title in fee simple to such property shall vest in the petitioner and the right to just compensation shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of six per centum per annum to the date of payment on the amount finally awarded as the value of the property; but interest shall not be allowed on so much thereof as shall have been paid into court. No sum so paid into court shall be charged with commissions or poundage.[3]

(Added, L 1972)

Upon the application of the parties in interest, the court may order that money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said property, or any parcel thereof, shall exceed the amount of money so received by any person entitled thereto, the court shall enter judgment against the agency or municipality for the amount of the deficiency.

(Added, L 1972)

Upon the filing of a declaration of taking, the court shall have the power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession. The court shall have the power to make such orders in respect to encumbrances, liens, rents, taxes, assessments, insurance and other charges, if any, as shall be just and equitable.

Section 501, General Municipal Law.

§ 501. Policy and purposes of article.—There exist in many municipalities within this state residential, non-residential, commercial, industrial or vacant areas, and combinations thereof, which are slum or blighted, or which are becoming slum or blighted areas because of substandard, insanitary, deteriorated or deteriorating conditions, factors, and characteristics, with or without tangible physical blight. The existence of such areas constitutes a serious and growing menace, is injurious to the public safety, health, morals and welfare, contributes increasingly to the spread of crime, juvenile delinquency and disease, necessitates excessive and disproportionate expenditures of public funds for all forms of public service and constitutes a negative influence on adjacent properties impairing their economic soundness and stability, thereby threatening the source of public revenues.

In order to protect and promote the safety, health, morals and welfare of the people of the state and to promote the sound growth and development of our municipalities, it is necessary to correct such substandard, insanitary, blighted, deteriorated or deteriorating conditions, factors and characteristics by the clearance, replanning, reconstruction, redevelopment, rehabilitation, restoration or conservation of such areas, the undertaking of public and private improvement programs related thereto and the encouragement of participation in these programs by private enterprise.

It is necessary for the accomplishment of such purposes to grant municipalities of this state the rights and powers

provided in this article. The use of such rights and powers to correct such conditions, factors and characteristics and to eliminate or prevent the development and spread of deterioration and blight through the clearance, replanning, reconstruction, rehabilitation, conservation or renewal of such areas, for residential, commercial, industrial, community, public and other uses is a public use and public purpose essential to the public interest, and for which public funds may be expended.

Section 507, General Municipal Law.

§ 507. **Disposition of property.—1.** In addition to employing any other lawful method of utilizing or disposing of any real property, and appurtenances thereto or any interest therein owned by a municipality or acquired by it pursuant to section five hundred six of this article, a municipality may sell, lease for a term not exceeding ninety-nine years, or otherwise dispose of any such real property and appurtenances thereto, to any person, firm or corporation at the highest marketable price or rental at public auction or by sealed bids pursuant to the provisions of any general, special or local laws applicable to the sale or disposition of real property by said municipality.

2. Notwithstanding anything to the contrary contained in this article and notwithstanding the provisions of any general, special or local law applicable to the sale of real property by a municipality, such real property and appurtenances thereto may be sold, leased for a term not exceeding ninety-nine years or otherwise disposed of for the effectuation of any of the purposes of the urban renewal program in accordance with the urban renewal plan:

(a) to any limited profit housing company organized pursuant to the provisions of article two of the private housing finance law without public auction or sealed bids;

(b) to any limited dividend housing company organized pursuant to article four of the private housing finance law or redevelopment company organized pursuant to article five of the private housing finance law, without public auction or sealed bids provided that notice of such sale, lease or other disposition is published and a public hearing is held before the governing body not less than ten days after such publication;

(c) to any person, firm or corporation designated by the agency and approved by the governing body as a qualified and eligible sponsor in accordance with established rules and procedures prescribed by the agency, provided that (1) the agency has published, in at least one newspaper of general circulation in the municipality at least ten days prior to such sale, lease or other disposition, a notice which shall include a statement of the identity of the proposed sponsor and of his proposed use or reuse of the urban renewal area or of the applicable portion thereof; such notice shall be in such form and manner as may be prescribed by the agency and, in the case of projects aided by a state loan, periodic subsidy or capital grant or in which application has been made for such loan, subsidy or grant, as approved by the commissioner; (2) such proposed sponsor agrees to pay the minimum price or rental fixed by the agency for such real property; (3) such proposed sponsor matches any bid higher than the said minimum price or rental, and (4) such sale, lease or other disposition shall require effectuation of the purpose thereof within a definite and reasonable period of time. In the event that such qualified and eligible sponsor does not agree to pay the minimum price or rental fixed by the agency or fails to match any higher bid than such minimum price or rental, a municipality may, in its sole discretion and only if consistent with the urban renewal plan, sell or lease for a term not exceeding ninety-nine years any such real property and appurtenances thereto, to any person, firm or corporation,

the property acquired from such person, firm or corporation or substantially equivalent property within the urban renewal area, provided that such former owner (1) agrees to pay the said minimum price or rental and (2) matches any higher bid than said minimum price or rental, and

(d) to any person, firm or corporation designated by the agency as a qualified and eligible sponsor pursuant to the provisions of clause (1) of subsection (c) of this subdivision without public auction or sealed bids, provided that (1) the price or rental to be paid by such sponsor for such property and all other essential terms and conditions of such sale, lease or other disposition shall be included in the notice published by the agency pursuant to the said clause (1) of subsection (c) of this subdivision, (2) that such sale, lease or other disposititon be approved by the governing body after a public hearing held not less than ten days after the publication of such notice, and (3) such sale, lease or other disposition shall, in the case of projects aided by a state loan, periodic subsidy or capital grant or in which application has been made for such loan, subsidy or grant, be approved by the commissioner.

(e) for the effectuation of any of the purposes of the urban renewal program and in accordance with the urban renewal plan, a municipality may grant, sell, convey or lease, without public hearing or public letting, to a public utility subject to the jurisdictiton of the public service commission, for construction and maintenance of public utility systems, and the conduct and operation thereof, for such length of time as it may deem advisable, franchises, easements or rights of way, in, over, below, along or across any lands acquired by the municipality pursuant to this article, upon such terms and conditions, for such consideration and subject to such restrictions as in the judgment of its governing body shall seem proper, provided, the governing body shall first determine that the use and enjoyment for

such purposes of such lands is not inconsistent with the purposes and provisions of the urban renewal plan.

3. Any deed, lease or instrument by which real property and appurtenances thereto, or any interest therein is conveyed or disposed of pursuant to this section shall contain provisions requiring the purchaser, lessee or grantee to replan, clear, rehabilitate, restore, renew, conserve, improve, reconstruct or redevelop such property in accordance with the urban renewal plan as approved by the governing body and within a definite and reasonable period of time subject to the terms of the contract relating thereto between the municipality and the sponsor, and provisions insuring the use of such real property for purposes consistent with such urban renewal plan.

Article 1, Section 7, New York State Constitution.

§ 7. [Compensation for taking private property; private roads; drainage of agricultural lands, excess condemnation.]—(a) Private property shall not be taken for public use without just compensation.

(b) [Repealed]

(c) Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road and the amount of all damage to be sustained by the opening thereof shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceedings, shall be paid by the person to be benefited.

(d) The use of property for the drainage of swamp or agricultural lands is declared to be a public use, and general laws may be passed permitting the owners or occupants of swamp or agricultural lands to construct and maintain for the drainage thereof, necessary drains, ditches and dykes upon the lands of others, under proper

restrictions, on making just compensation, and such compensation, together with the cost of such drainage may be assessed, wholly or partly, against any property benefited thereby; but no special laws shall be enacted for such purposes.

(e) [Repealed]

Article 18, Section 2, New York State Constitution. Art XVIII § 2

§ 2. [Idem; powers of legislature in aid of.]—For and in aid of such purposes, notwithstanding any provision in any other article of this constitution, but subject to the limitations contained in this article, the legislature may: make or contract to make or authorize to be made or contracted capital or periodic subsidies by the state to any city, town, village, or public corporation, payable only with moneys appropriated therefor from the general fund of the state; authorize any city, town or village to make or contract to make such subsidies to any public corporation, payable only with moneys locally appropriated therefor from the general or other fund available for current expenses of such municipality; authorize the contracting of indebtedness for the purpose of providing moneys out of which it may make or contract to make or authorize to be made or contracted loans by the state to any city, town, village or public corporation; authorize any city, town or village to make or contract to make loans to any public corporation; authorize any city, town or village to guarantee the principal of an interest on, or only the interest on, indebtedness contracted by a public corporation; authorize and provide for loans by the state and authorize loans by any city, town or village to or in aid of corporations regulated by law as to rents, profits, dividends and disposition of their property or franchises and engaged in providing housing facilities or nursing home accommodations; authorize any city, town or village to make loans to the owners of existing multiple dwellings for the rehabilitation and improvement thereof for occupancy by persons of low income as defined by law; grant or authorize tax exemptions in whole or in part, except that no such exemption may be granted or authorized for a period of more than sixty years; authorize cooperation with and the acceptance of aid from the United States; grant the power of eminent domain to any city, town or village, to any public corporation and to any corporation regulated by law as to rents, profits, dividends and disposition of its property or franchises and engaged in providing housing facilities.

As used in this article, the term "public corporation" shall mean any corporate governmental agency (except a county or municipal corporation) organized pursuant to law to accomplish any or all of the purposes specified in this article.

Article 18, Sections 9 and 10, New York State Constitution.

§ 9. [Acquisition of property for purposes of article.]—Subject to any limitation imposed by the legislature, the state, or any city, town, village or public corporation, may acquire by purchase, gift, eminent domain or otherwise, such property as it may deem ultimately necessary or proper to effectuate the purposes of this article, or any of them, although temporarily not required for such purposes.

§ 10. [Power of legislature; construction of article.]—The legislature is empowered to make all laws which it shall deem necessary and proper for carrying into execution the foregoing powers. This article shall be construed as extending powers which otherwise might be limited by other articles of this constitution and shall not be construed as imposing additional limitations, but nothing in

this article contained shall be deemed to authorize or empower the state, or any city, town, village or public corporation, to engage in any private business or enterprise other than the building and operation of low rent dwelling houses for persons of low income as defined by law, or the loaning of money to owners of existing multiple dwellings as herein provided.

Section 4, Condemnation Law of the State of New York.

§ 4. Petition to supreme or county court; what to contain.

The proceeding shall be instituted by the presentation of a petition by the plaintiff to the county court of the county in which the property is situated or to a special term of the supreme court, held in the judicial district in which the property is located setting forth the following facts:

1. His name, place of residence, and the business in which engaged; if a corporation, co-operative corporation or joint-stock association, whether foreign or domestic, its principal place of business within the state, the names and places of residence of its principal officers, and of its directors, trustees or board of managers, as the case may be, and the object or purpose of its incorporation or association; if a political division of the state, the names and places of residence of its principal officers; and if the state, or any commission or board of managers or trustees in charge or having control of any of the charitable or other institutions of the state, the name, place of residence of the officer acting in its or their behalf in the proceedings.

2. A specific description of the property to be condemned, and its location, by metes and bounds, with reasonable certainty.

3. The public use for which the property is required and either:

a. a concise statement of the facts showing the necessity of its acquisition for such use, or,

b. if the property is to be used for the construction of a major utility transmission facility as defined in section one hundred twenty or major steam electric generating facility as defined in section one hundred forty of the public service law with respect to which a certificate of environmental compatibility and public need has been issued under such law, a statement that such certificate relating to such property has been issued and is in force.

3. The public use for which the property is required and a concise statement of the facts showing the necessity of its acquisition for such use.

4. The names and places of residence of the owners of the property; if an infant, the name and place of residence of his general guardian, if he has one; if not, the name and place of residence of the person with whom he resides; if a lunatic, idiot, or habitual drunkard, the name and place of residence of his committee or trustee, if he has one; if not, the name and place of residence of the person with whom he resides. If a non-resident, having an agent or attorney residing in the state authorized to contract for the sale of the property, the name and place of residence of such agent or attorney; if the name or place of residence of any owner cannot after diligent inquiry be ascertained, it may be so stated with a specific statement of the extent of the inquiry which has been made.

5. That the plaintiff has been unable to agree with the owner of the property for its purchase, and the reason of such inability.

6. The value of the property to be condemned.

7. A statement that it is the intention of the plaintiff, in good faith, to complete the work or improvement, for which the property is to be condemned; and that all the preliminary steps required by law have been taken to entitle him to institute the proceedings.

8. A demand for relief, that it may be adjudged that the public use requires the condemnation of the real property described, and that the plaintiff is entitled to take and hold such property for the public use specified, upon making compensation therefor, and that commissioners of appraisal be appointed to ascertain the compensation to be made to the owners for the property so taken.

Sections 5 and 6, Condemnation Law of the State of New York.

§ 5. Notice to be annexed to petition; service.—There must be annexed to the petition a notice of the time and place at which it will be presented to a term of the county court of the county in which the property is situated or to a special term of the supreme court, held in the judicial district where the property or some portion of it is situated, and a copy of the petition and notice must be served upon all the owners of the property at least eight days prior to its presentation.

§ 6. Service of petition and notice.—Service of the petition and notice must be made in the same manner as the service of a summons in an action in the supreme court is required to be made, and all the provisions of article twenty-five of the civil practice act which relate to the service of a summons, either personally or in any other way, and the mode of proving service, shall apply to the service of the petition and notice, except that in a proceeding in which publication is made in newspapers there may be attached to the notice in lieu of the petition, a statement of the object of the proceeding and a brief description of the real property sought to be acquired. If the defendant has an agent or attorney residing in this state, authorized to contract for the sale of the real property described in the petition, service upon such agent or attorney will be sufficient service upon such defendant. In case the defendant is an infant of the age of fourteen years or upwards, a copy of the petition and notice shall also be served upon his general guardian, if he has one; if not, upon the person with whom he resides.

Section 11, Condemnation Law of the State of New York.

§ 11. Trial of issues.—The court shall try any issue raised by the petition and answer at such time and place as it may direct, or it may order the same to be referred to a referee to hear and determine, and upon such trial the court or referee shall file a decision in writing, or deliver the same to the attorney for the prevailing party, within twenty days after the final submission of the proofs and allegations of the parties, and the provisions of the civil practice act relating to the form and contents of decisions upon the trial of issues of fact by the court or a referee, and to making and filing exceptions thereto, and the making and settlement of a case for the review thereof upon appeal, and to the proceedings which may be had in case such decision is not filed or delivered within the time herein required, and to the powers of the court and referee upon such trial, shall be applicable to a trial and decision under this chapter.

Section 26, Condemnation Law of the State of New York.

§ 26. **Power of court to make necessary orders.**—In all proceedings under this chapter, where the mode or manner of conducting all or any of the proceedings therein is not expressly provided for by law, the court before whom such proceedings may be pending, shall have the power to make all necessary orders and give necessary directions to carry into effect the object and intent of this chapter, and of the several acts conferring authority to condemn lands for public use, and the practice in such cases shall conform, as near as may be, to the ordinary practice in such court.

Rule 409, New York Civil Practice Law and Rules.

Rule 409. Hearing.

(a) Furnishing of papers; filing. Upon the hearing, each party shall furnish to the court all papers served by him. The petitioner shall furnish all other papers not already in the possession of the court necessary to the consideration of the questions involved. Where such papers are in the possession of an adverse party, they shall be produced by such party at the hearing on notice served with the petition. The court may require the submission of additional proof. All papers furnished to the court shall be filed unless the court orders otherwise.

(b) Summary determination. The court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised. The court may make any orders permitted on a motion for summary judgment.